(4)

Supreme Court, U.S.
FILED
FEB 16 2000
CLERK

No. 99-858

IN THE

Supreme Court of the United States

CITY OF ANAHEIM,
Petitioner,

vs.

CALIFORNIA CREDIT UNION LEAGUE, AND
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

MOSES W. JOHNSON, IV
Counsel of Record

OFFICE OF THE CITY ATTORNEY
CITY OF ANAHEIM

200 South Anaheim Boulevard, Suite 356
Anaheim, California 92805
(714) 765-5169

Counsel for Petitioner
CITY OF ANAHEIM

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

11 PP

QUESTION PRESENTED

Whether, under 12 U.S.C. § 1768 and the federal supremacy clause, the City of Anaheim can constitutionally levy its transient occupancy tax upon employees of federal credit unions (or federal employees) when the employee is on employer business and the employee pays the hotel with an employer check advanced by the employer.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. THE LEGAL INCIDENCE OF THE TOT FALLS ON THE EMPLOYEES OF LEAGUE AND NOT ON LEAGUE 2

III. LEAGUE EMPLOYEES RECEIVE A PERSONAL BENEFIT FROM STAYING AT THE DISNEYLAND HOTEL 3

IV. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A CLEAR CONFLICT BETWEEN THE NINTH CIRCUIT AND THE FOURTH CIRCUIT 4

V. CONCLUSION 6

TABLE OF AUTHORITIES

Page

Cases

United States v. County of Fresno
429 U.S. 452, 97 S.Ct. 699
50 L.Ed.2d 683 (1977) 3-5

United States v. Montgomery County
761 F.2d 998 (4th Cir. 1985) 1, 3-6

United States v. New Mexico
455 U.S. 720, 102 S.Ct. 1373
71 L.Ed.2d 580 (1982) 2, 5

Opinions

75 Ops.Cal.Atty.Gen. 86, 88 (1992) 4

I.

INTRODUCTION

The opposition briefs filed by Respondents, California Credit Union League ("League") and the United States ("U.S.") argue that League employees are not subject to Petitioner's transient occupancy tax ("TOT") because the employees are agents of League and, therefore, the legal incidence of the TOT falls on the government. Further, the League employees do not derive any personal benefit from the hotel room. As will be demonstrated below, Respondents' arguments fail on both grounds. Although the employees of League may be traveling on League business, the activity being taxed, to wit, the personal use of a hotel room, is not part of the League's business. Further, it simply defies all logic and common sense to argue that a private room in a premiere resort hotel does not confer a personal benefit on the guest of the hotel.

Petitioner will also show that review by this Court is necessary because of the obvious conflict between the circuits on this important issue of federal taxation law. The Fourth District in *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985), in effect, elevated guests of the federal instrumentality to the status of employees of that instrumentality in order to reach its common sense conclusion that the federal government simply does not meet the definition of "transient." Thus, Respondents attempt to distinguish the *Montgomery County* case fails.

II.

THE LEGAL INCIDENCE OF THE TOT FALLS ON THE EMPLOYEES OF LEAGUE AND NOT ON LEAGUE

Respondents place heavy reliance on *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982), to support their position that the League employees stand in the shoes of the League when they stay at the Disneyland hotel and, therefore, the legal incidence of the TOT falls on League. On close scrutiny, however, Respondents argument has no merit.

As this Court correctly stated, immunity from state or local taxation is only appropriate, "when the levy falls on the United states itself, or an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, *at least insofar as the activity being taxed is concerned.*" 455 U.S. at 736 (emphasis added). What both Respondents choose to ignore is the activity being taxed, namely, the *private* use of a hotel room. With respect to that activity, the government and the government employees are separate entities. If such were not the case, the government would have unfettered right to entry into the private hotel room of any of its agents at any time. Surely Respondents and this Court could not support such an outrageous, yet logical extension of Respondents' argument.

The fact that the League employees would not be using the hotel room but for traveling on League business misses the point. The employee's use of the hotel room, just like the employee's meal, is inherently personal. Accordingly, the costs associated with the use of the

room fall on the employee. The decision of the League to reimburse its employees for the TOT does not convert the TOT to a tax on the government. As the Fourth District stated, "... the United States Government ... simply does not meet the definition of 'transient.' " *Montgomery County*, *supra*, 761 F.2d at 1000.

III.

LEAGUE EMPLOYEES RECEIVE A PERSONAL BENEFIT FROM STAYING AT THE DISNEYLAND HOTEL

Respondents attempt to distinguish this Court's decision in *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977), by arguing that the federal employees in that case derived a personal benefit from the housing provided by the government. In *County of Fresno*, this Court based its decision on the fact that the local tax at issue was on personal benefits of the employee, i.e., wages and not a tax on federal functions or federal property. 429 U.S. at 466. Recognizing that this distinction was the basis for this Court's decision in *County of Fresno*, Respondents make the bold, yet wholly unsupported, assertion that the League employees enjoy no personal benefit from the hotel room. Once again Respondents' analysis falls short. The activities that take place in a private hotel room such as sleeping, eating, watching television or other personal activities are simply not federal functions. Likewise, an employee's personal hotel room does not constitute federal property. If it did, the federal government would have unfettered right to access to the private hotel rooms of its employees. Of course, as a matter of law, this is not the case.

As stated earlier, the fact that the League employees would not be staying at the hotel but for League business does not eliminate the personal nature of the hotel room and the activities that take place therein. The federal employees in the *County of Fresno* case would not have the need for federal housing but for their federal job. Yet, this Court properly upheld the local tax in that case. Petitioner's TOT is a tax on the use of a hotel room. That use is not a government function, but a personal activity from which the League employees derive a personal benefit. As stated by the California Attorney General, "I[n] our view, the tax remains on the employee for 'the privilege of occupying a room.'" 75 Ops.Cal.Atty.Gen. 86, 88 (1992). Accordingly, the TOT should be upheld.

IV.

REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A CLEAR CONFLICT BETWEEN THE NINTH CIRCUIT AND THE FOURTH CIRCUIT

Conceding that the Fourth Circuit in the *Montgomery County* case determined that the transient occupancy tax in that case fell on the person occupying the room and not the federal government, Respondents attempt to distinguish that case on the ground that the hotel occupants in that case were guests of the federal government and not federal employees. A close reading of the *Montgomery County* case reveals the fatal flaw in Respondents' argument.

The Fourth District in *Montgomery County* held that given the definition of the term "transient" in the local ordinance, "... the United States Government which arranges a room ... which is occupied only a day or two at a time by any one visiting *employee* or guest simply does not meet the definition of 'transient' " 761 F.2d at 1000 (emphasis added). Respondent U.S. dismisses this statement by describing it as a "brief reference to a 'visiting employee or guest.' " U.S. Opposition at 10, n.6. Respondent League surprisingly states that "*Montgomery County* does not even discuss *employees.*" League Opposition at 18. Both Respondents have misconstrued the Fourth District's analysis of the issue. In light of the facts of the *Montgomery County* case, the Fourth District necessarily elevated the National Institutes Of Health's ("NIH's") guests to the status of employees of a government instrumentality in reaching its conclusion. If, as Respondents suggest, the *Montgomery County* case has nothing to do with employees of government instrumentalities, the Fourth District could have easily, and presumably would have, concluded that the tax falls on a third party, without any reference to "employees." It did not do so. Instead, it treated the NIH guests on equal footing with NIH employees, and consistent with the analysis in *New Mexico* and *County of Fresno*, concluded that, as a matter of law, the federal government cannot engage in the personal activity of occupying a private hotel room as a transient. The Fourth Circuit then held: "Since the tax falls on the transient, the occupant of the sleeping accommodations, the fact of reimbursement by the United States or one of its agencies does not invalidate it under the supremacy clause." *Montgomery County, supra*, 761 F.2d at 1002. The Ninth Circuit's decision fails to even mention the precedent established by the Fourth Circuit.

Petitioner submits that the *Montgomery County* case presents the more reasoned conclusion consistent with this Court's precedent, and for that reason, the Ninth Circuit's opinion should be reversed. At a minimum, however, this Court is presented with inconsistent federal appellate court decisions on a important issue of federal taxation law, and, therefore, review is necessary to resolve the conflict.

V.

CONCLUSION

The Ninth Circuit erred in holding that Petitioner's TOT is a tax on federal business and not a tax on the personal activities of transients as defined in Petitioner's Municipal Code. The Ninth Circuit opinion directly conflicts with the opinion of the Fourth District regarding the application of a local transient occupancy tax on employees of federal agencies or instrumentalities.

Accordingly, based upon the foregoing and for all the reasons set forth in Petitioner's Petition, Petitioner respectfully requests that this Court grant Certiorari to review this important issue.

DATED: February 11, 2000.

Respectfully submitted,

MOSES W. JOHNSON, IV
Counsel of Record

OFFICE OF THE CITY ATTORNEY
CITY OF ANAHEIM

Counsel for Petitioner
CITY OF ANAHEIM